

No. 17-5474

**FILED**  
Aug 23, 2018  
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE  
UNITED STATES DISTRICT  
COURT FOR THE WESTERN  
DISTRICT OF KENTUCKY

The Plaintiffs appealed, raising four issues. *First*, whether under *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017), decided after the district court’s decision, the individual arbitration agreements conflicted with the National Labor Relations Act (“NLRA”)’s collective-action guarantees. *Second*, whether the individual arbitration agreements conflicted with the FLSA’s collective-action guarantees. *Third*, whether the arbitrator or the district court should initially decide whether the Plaintiffs were employees (who are covered by the NLRA and

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FLSA) or independent contractors (who are not covered by the NLRA or FLSA). *Fourth*, whether the district court abused its discretion by enforcing individual arbitration before facilitating notice to other potential class members pursuant to Section 216(b) of the FLSA.

We delayed deciding this case because the Supreme Court’s then-pending decision in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), would resolve the first issue, and our then-pending decision in *Gaffers v. Kelly Servs., Inc.*, No. 16-2210 (6th Cir. 2018), would resolve the second issue. In *Epic*, the Supreme Court abrogated our *Alternative Entertainment* decision and held that individual arbitration agreements do not conflict with the NLRA’s collective-action guarantees. *See* 138 S. Ct. at 1623–32. And in *Gaffers*, we held that individual arbitration agreements do not conflict with the FLSA’s collective-action guarantees. *See* No. 16-2210, \_\_ F.3d \_\_, slip op. at 2 (6th Cir. Aug. 15, 2018). *Epic* and *Gaffers* control here, and resolve the first and second issues in this case in the Defendants’ favor. And because the holdings of *Epic* and *Gaffers* mean that individual arbitration agreements are enforceable against both employees and independent contractors, we need not resolve what would have been the third issue in this case if *Epic* and *Gaffers* had gone the other way.

This leaves us with only the fourth issue, and *Epic* and *Gaffers* have made it an easy one. In FLSA collective actions, the Supreme Court has authorized district courts to facilitate notice to similarly situated potential plaintiffs. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169–74 (1989). Whether or how to facilitate notice, however, is within the discretion of the district court. *Id.* at 171. The Plaintiffs cite no in-circuit authority showing that the district court abused its discretion at the time by declining to facilitate notice to other potential plaintiffs. But even if the district court did abuse its discretion, after *Epic* and *Gaffers* there will be no FLSA collective action against the Defendants about which the district court could facilitate notice.

For these reasons, we **AFFIRM** the judgment of the district court.